

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 02-31269-WRS

Chapter 7

VIVIAN JONES,

Debtor.

KENNETH JONES,

Plaintiff,

v.

Adv. Pro. No. 02-3085-WRS

VIVIAN S. JONES,

Defendant.

MEMORANDUM DECISION

This Adversary Proceeding came before the Court for trial on February 23, 2004. Plaintiff Kenneth Jones was present in person and by counsel Daniel Feinstein. Defendant Vivian S. Jones was present in person and by counsel Sandra Lewis. The question presented is whether the liability for a debt owed by Vivian Jones to Kenneth Jones, pursuant to Paragraphs 6 and 7 of the Divorce Decree, is excepted from discharge pursuant to 11 U.S.C. § 523(a)(15). For the reasons set forth below, the Court finds that it is. The Court will, by way of a separate document, enter judgment for Kenneth Jones.

I. FACTS

Kenneth and Vivian Jones were divorced pursuant to a decree entered by the Circuit Court of Elmore County, Alabama, under Case No. DR-98-405, on May 13, 1999. (PEX 1). Paragraphs 6 and 7 of the divorce decree provide as follows:

6. The parties jointly own real property consisting of a house and a lot located at 535 New Bingham Road, Wetumpka, Alabama, which was acquired during the marriage of the parties. The Husband shall have sole custody of this property and shall be solely responsible for all mortgage

payments associated with this property, under this property is sold. At which time, any equity will be divided equally. The parties also jointly own real property consisting of a house and a lot located at 2748 Countrybrook Drive, Montgomery, Montgomery County, Alabama, which was acquired by the Husband prior to the marriage of the parties, but was used as marital property. This property shall become the sole property of the Husband, who will refinance this property without the security of the Wife's signature and indemnify the Wife from any liability associated with this property. The debt associated with this property is to be maintained by the Husband in accordance with his possessor [sic] interest in this property.

7. There are outstanding mortgage and equity payments to be made as previously ordered by this Court. The Husband shall be solely responsible for the November, 1998 payments totaling \$1,242.00. The full responsibility for the monthly mortgage payment on the Elmore County property shall be the Husband's until such time as this property is sold. At which time, any equity in that property after all obligations are satisfied shall be equally divided. Both parties shall be equally responsible for the indebtedness known as the "home equity accounts" on the Elmore County property. The Wife is responsible for payment to the Husband of \$334.27 on the first of each month to cover her share of this debt, until this property is sold and this debt satisfied. The Husband shall forward, in a timely manner, \$668.54 to the lender holding an interest in the equity on this property.

(PEX 1, Emphasis added).

Vivian Jones filed a petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Code in this Court on April 24, 2002, under Case No. 02-31269. She was granted a discharge on August 30, 2002. (Case No. 02-31269, Doc. 19).

When a debtor files bankruptcy, she is required to file Statements and Schedules on forms prescribed by Judicial Conference of the United States. 11 U.S.C. § 521(1), (2); FED. R. BANKR. P. 9009. Vivian Jones filed Schedules indicating that she owned one vehicle, a 1992 Honda Accord. (Case No. 02-31269, Doc. 1, Schedule B).¹ On Schedule D, which is a list of all the debtor's secured

¹ On Schedule B, a debtor is required to list all of her personal property.

indebtedness, a debt to GMAC in the amount of \$41,943.00, is scheduled. Schedule D calls for the debtor to indicate the “date claim was incurred, nature of lien and description and market value of property subject to lien.” In response, Vivian Jones indicated “Tahoe” and further disclosed a value of \$41,943.00. She did not disclose the date on which the claim was incurred. For that matter, she did not elaborate on what she meant by “Tahoe.” Through testimony adduced at trial, the Court learned that this was a Chevrolet Tahoe, which is a Sports Utility Vehicle (SUV), purchased on March 30, 2002. Based upon a purchase price of over \$42,000.00, the Court surmises that it must have been pretty well loaded. The record in Vivian Jones’ Chapter 7 bankruptcy case does not indicate whether the Trustee or any of the creditors (except GMAC) noted the discrepancy in her schedules. The Chevrolet Tahoe should have been listed on Line 23 of Schedule B.

On June 13, 2002, Vivian Jones filed a Reaffirmation Agreement with the Court. (PEX 7) (Case No. 02-31269, Doc. 13). The purpose of a reaffirmation agreement to provide that the indebtedness, which would otherwise be discharged, survives the bankruptcy proceeding and remains an enforceable debt. 11 U.S.C. § 524(c). A debtor in this Circuit must do so if she wishes to keep property which is subject to a security interest. Taylor v. AGE Fed. Credit Union (*In re Taylor*), 3 F.3d 1512, 1516-17 (11th Cir. 1993) (debtor who wishes to retain property subject to a security interest must reaffirm). To put the matter plainly, Vivian Jones purchased an SUV for \$42,000.00, less than 30 days prior to filing her petition in bankruptcy, and reaffirmed that indebtedness. The monthly payment for the Tahoe is \$535.00. (DEX 5).

Vivian Jones’ adjusted gross income, for the years 2000 and 2001 was \$40,024.00 and \$41,220.00, respectively. (PEX 3, 4, 5 and 6). The Court is perplexed that she would purchase a vehicle with a cost equal to one year’s salary on the eve of filing a petition in bankruptcy. That she failed to list

the Chevrolet Tahoe on Schedule B is not a point in her favor.² The evidence also established that Kenneth Jones' income was approximately equal to that of Vivian Jones.

II. LAW

This Court has jurisdiction to hear this adversary proceeding pursuant to 28 U.S.C. § 1334. This is a "core proceeding," for which the Bankruptcy Court may enter a final judgment. 28 U.S.C. § 157(b)(2)(I). The dischargeability of the subject indebtedness is controlled by 11 U.S.C. § 523(a)(15), which provides as follows:

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt—

* * *

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce . . . unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequence to a . . . former spouse . . . of the debtor.

11 U.S.C. § 523(a)(15).

This provision set up a two part process. The Plaintiff bears the initial burden to show that the debt in question is within the scope of Section 523(a)(15). If he does so, the burden shifts to the Defendant to show that he meets one of the two exceptions (subpart (A) or subpart (B)). Cameron v. Cameron (*In re Cameron*), 243 B.R. 117, 121 (M.D. Ala. 1999). The Plaintiff has met his initial burden

² A debtor who files false schedules may be denied a discharge. 11 U.S.C. § 727(a)(4)(A).

pursuant to the stipulation entered into prior to trial. (Doc. 29). That is, the debt in question was incurred in the course of a divorce and it is not of a kind described in Section 523(a)(5). See 11 U.S.C. § 523(a)(5) (excepting debts for alimony, maintenance or support). Therefore, Vivian Jones must prove either: (A) that she does not have the ability to pay this debt from income or property not reasonably necessary to be expended for the maintenance or support of herself or her dependant children; or (B) that discharging such debt would result in a benefit to her that outweighs the detrimental consequence to Kenneth Jones. 11 U.S.C. § 523(a)(15). The Court will consider each provision separately.

III. DISCUSSION

A. ABILITY TO PAY (11 U.S.C. § 523(a)(15)(A))

The Court will first consider whether Vivian Jones has the ability to pay the debt she owes her former husband. It is important to bear in mind that the burden shifts to her. That is, she must prove that she does not have the ability to pay the subject indebtedness. *In re Cameron*, 243 B.R. at 122. Vivian Jones attempted to carry her burden both with her testimony and with a monthly budget. (DEX 5). However, less than 30 days prior to filing her Chapter 7 petition she purchased a Chevrolet Tahoe for \$42,000.00. She pays \$535.00 per month for that alone. In addition, she pays \$117.00 per month for automobile insurance. (DEX 5). She budgets an additional \$140.00 per month for gasoline and repairs. (DEX 5). After these obligations are met, she claims that she cannot pay the \$334.27 which is required by Paragraph 7 of the May 13, 1999 Divorce Decree. Having considered its record, the testimony and demeanor of Vivian Jones, and the documentary evidence, the Court finds that she has failed to carry her burden with respect to the “ability to pay” provision. 11 U.S.C. § 523(a)(15)(A).

B. BALANCE OF HARM (11 U.S.C. § 523(a)(15)(B))

The Court will next consider whether Vivian Jones has carried her burden with respect to the second prong, whether “discharging such debt would result in a benefit to the debtor that outweighs the

detrimental consequences to a . . . former spouse.” 11 U.S.C. § 523(a)(15)(B). The evidence shows that both parties earn slightly more than \$40,000.00 per year. A judgment in favor of either party will necessarily entail detrimental consequences to the other. Having considered all of the evidence, the Court finds that the benefit to Vivian Jones of discharging this debt will not outweigh the detrimental consequence to Kenneth Jones. Therefore, she also failed to carry her burden on the second exception.

C. OTHER MATTERS

When deciding Adversary Proceedings such as this one, the Court is of the view that it is as important to indicate what is not decided as to say what has been decided. The May 13, 1999 Divorce Decree makes an elaborate provision for the sale of the residence and the payment of the indebtedness secured by the residence in the meantime. This Court has determined that Vivian Jones’ liability to make the \$334.27 payment to Kenneth Jones each month does not discharge. She was disappointed that her former husband has not been required either to sell or refinance the home, thereby relieving her of this obligation. However, it is for the Circuit Court of Elmore County, and not this Court, to determine when and if the sale should happen.

It should also be noted that this Court has not attempted to liquidate the subject liability. That determination is left to the Circuit Court of Elmore County as well. This Court has not made a finding as to the total amount of the subject liability. This Court’s determination is nothing more than a determination that Vivian Jones’ liability pursuant to Paragraph 7 of the Divorce Decree is excepted from discharge pursuant to 11 U.S.C. § 523(a)(15). In other words, the liability did not discharge.

IV. CONCLUSION

The Court finds that Vivian Jones has failed to carry her burden under either of the prongs or exceptions of the two part test of Section 523(a)(15). The Court will, by way of a separate document, enter judgment for Plaintiff Kenneth Jones. The subject indebtedness is excepted from discharge

pursuant to 11 U.S.C. § 523(a)(15).

Done this 1st day of April, 2004.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Daniel L. Feinstein, Attorney for Plaintiff
Sandra H. Lewis, Attorney for Defendant